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# Supreme Court of the United States

October Term, 1967

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SUPREME COURT, U.S.

No. 430

G. I. DISTRIBUTORS, INC.,
*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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40 Returns

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

*To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:*

Petitioner, G. I. Distributors, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered June 1, 1967.

### Opinions Below

The action was tried in the Criminal Court of the City of New York, County of Queens. No opinion was delivered by the three judge court before whom the action was tried (R. 24) or by the Appellate Term for the Second Department in affirming (R. 32). But there was a dissenting opinion (R. 32) that has not been officially reported. A copy is annexed, *infra,* pages 15-17. The opinions of the Court of Appeals have not been officially reported. Copies are annexed at pages 18-23, *infra.*

## Jurisdiction

The judgment of the Court of Appeals was rendered June 1, 1967. Thereafter a timely application was made for rehearing which was denied on July 7, 1967 but an application for amendment of the Court's remittitur to indicate what constitutional issues had been raised was granted. A copy of that order is set forth at pages 24, 25, *infra*.

## Questions Presented

1. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, an accused in a State obscenity prosecution, as the petitioner herein, can be convicted without any proof in the record that the magazine involved exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity.

2. Whether, in the light of the requirements of due process of law under the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the State's failure to bear the burden of proving in the obscenity prosecution herein that the magazine involved exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity, invalidates the judgment of conviction rendered against petitioner.

3. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a State may regard the trier of fact in a local obscenity prosecution as the embodiment of national community standards, competent to judge a challenged magazine against those standard, without any evidence in the

record, as in the case herein, to establish that the magazine exceeds contemporary community standards, or appeals to prurient interest or is utterly without social importance.

4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law.

5. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the magazine involved in the prosecution herein upon which a judgment of conviction was rendered is entitled to constitutional protection.

## Constitutional and Statutory Provisions Involved

New York Penal Law § 1141 provides, so far as here relevant:

> "1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine . . .
>
> "Is guilty of a misdemeanor . . ."

The constitutional provision applicable is the due process clause of the Fourteenth Amendment.

## Statement of the Case

The information charging a violation of Penal Law § 1141 did not originally specify what the material consisted of (R. 6). But it was, without objection, amended to refer to the magazine "Grecian Guild Studio Quarterly," No. 15, and two paperback books, "Gay Reunion" and "The Innocent Lesbian" (R. 10).

The book "Gay Reunion" was dropped from the case because of absence of proof of possession of any copies by defendant (R. 15). Defendant was acquitted as to the other book, "The Innocent Lesbian," but convicted as to the magazine, "Grecian Guild Studio Quarterly" (R. 24). It was fined $250 (R. 24) and the fine paid.

At the trial a police officer testified that, having obtained a search warrant, he spoke with Irving Herman, the president of defendant (R. 12) and asked him about pornographic material. Herman answered that they had none, and, when shown the material named in the warrant, said that it was not pornographic (R. 12). At that time he looked at the covers of the two books (R. 14). After testimony with regard to the number of copies fou d of "Grecian Guild Studio Quarterly" and "The Innocent Lesbian" (R. 14), the People rested (R. 14).

Defendant's counsel then moved to dismiss as to "Gay Reunion" and that was granted, as already noted (R. 15). With respect to the other material the motion rested in part on the failure of the People to offer any proof as to community standards (R. 15), in part on the failure of proof as to scienter (R. 16), and in part on the ground that the material was not obscene (R. 16). Decision was then reserved (R. 17).

Defendant's case consisted of offers of material distributed by it which had been declared not obscene in earlier litigation to which defendant had been a party (R. 18). These offers related only to the issue of scienter (R. 18) but they were rejected (R. 19). The material then offered which

relates to the magazine was a so-called "girlie" magazine, "Tonight, No. 5"—marked Defendant's Exhibit A for Identification (R. 19). That, as stated to the Court below, was one of the magazines included in the case of *Larkin* v. *G. I. Distributors, Inc.*, 14 N. Y. 2d 869, and there held not to be obscene (R. 18).

Defendant then rested, renewed the earlier motions, and moved for acquittal for failure to prove guilt beyond a reasonable doubt (R. 20). Decision was reserved and the motions disposed of as already indicated (R. 20).

The conviction was affirmed without opinion by the Appellate Term for the Second Department, Mr. Justice Gulotta dissenting in an opinion (R. 31). That opinion in part dealt with the issue of proof of community standards, but not in the way that issue had been presented at the trial. Mr. Justice Gulotta also expressed the view that the trial court should have received Exhibit A for Identification.

In the Court of Appeals the opinions dealt only with the issue of obscenity (see *infra*, pp. 18-23).

## How Federal Questions Were Presented

At the end of the People's case defendant's counsel moved to dismiss on the ground that, under decisions of this Court, it was necessary to establish community standards and that this had not been done (R. 15); that there was no proof of scienter (R. 16), and that, under the standards laid down by this Court the challenged material was not obscene (R. 16). These motions were renewed at the end of the entire case (R. 20).

These points were all presented to the New York Court of Appeals as it recognized in the order amending the remittitur. This set forth the federal constitutional issues as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether defendant-appellant's rights under the due process clause of the Fourteenth Amendment were violated. Defendant argued that the material upon which the prosecution was based was not obscene, that there was a burden upon the People to produce evidence of contemporary community standards, and that it was necessary for the prosecution to prove that defendant had reason to believe that the material violated the law. The Court of Appeals held that the constitutional rights of defendant-appellant had not been violated."

## Reasons for Granting the Writ

Due process of law in any case includes the presumption of innocence and imposes upon the prosecution the burden of proving the existence of every element necessary to constitute the crime charged. Particularly "where the transcendent value of speech is involved", due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser* v. *Randall,* 357 U.S. 513, 526.

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected material may be suppressed, and individuals involved in their circulation punished, under unproved charges. The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge* v. *Oregon,* 299 U.S. 353, 362; *Cole* v. *Arkansas,* 333 U.S. 196, 201; *Thompson* v. *City of Louisville,* 362 U.S. 199, 206.

In *Alberts* v. *California (Roth* v. *United States),* 354 U.S. 476, this Court held that the safeguards necessary for

securing the freedoms of speech and press for material not obscene required the following standard for judging the obscenity of a writing—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

The Court's opinion in *Roth-Alberts* further indicated that the newly formulated standard for judging obscenity was similar to the definition of obscenity formulated by the American Law Institute, to wit: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 354 U.S. 487, n.20.

*Roth-Alberts* would appear, therefore, to have made plain that one essential element of the crime of obscenity, in both State and Federal jurisdictions, is the extent to which the writing in question substantially exceeds contemporary community standards, *i.e.*, the limits of candor in depiction or representation of sex, nudity or excretion. Indeed, in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, it was noted that the proposed Official Draft of the American Law Institute defined obscenity as material which, if "'considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters'". 370 U.S. at 486. Mr. Justice Harlan stated: "Obscenity under the federal statute thus *requires proof of two distinct elements:* (1) patent offensiveness; and (2) 'prurient interest' appeal", 370 U.S. at 486 (emphasis supplied).

A review of the decided cases, therefore, appears to make plain that the burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole

rests upon the prosecution as a requirement of due process. Without such evidence in the record, it is obvious that no finding can be made that the material "goes substantially beyond customary limits of candor in description or representation of such matters". *Jacobellis* v. *Ohio,* 378 U.S. 184, 191.

In the case herein, there is absolutely no evidence in the record to support the conclusion that the magazine involved substantially exceed the limits of candor in the Nation as a whole. Nor is there any mystery as to what occurred at the trial level: The prosecutor handed the magazine to the court; the court examined it; the court found it "obscene". The State has suppressed a magazine, and placed the stigma of criminality upon its distributor, without proof that the books are outside the area of constitutional protection for freedom of expression.

Protection for non-obscene writings can only be assured if the burden is placed upon the prosecution to prove by sufficient evidence that the limits of candor have been exceeded in particular cases. *Cf., Weiman* v. *Updegraff,* 344 U.S. 183, 191. The limits of candor in the Nation as a whole at a given time cannot be a matter of "judicial notice". There can be no assumption in reason that any particular trier of facts in a particular local community knows, without evidence, what is the customary freedom of expression in the Nation as a whole with respect to sex and sex relations in the various media of communication, such as books, magazines, the motion pictures, the theatre, television, and in such fields of exploration as literature, art, science, physiology, psychology and other related areas. The limits of candor in the United States with respect to the depiction and representation of sex and nudity are not a matter of common and general knowledge, well established and authoritatively settled. So long as the belief existed that local standards were the criterion there may have been some argument for the position that the trial

judge might take judicial notice of the standards of his own community. But now that this Court has held, in *Jacobellis, supra*, that it is national standards that must govern, it would be irrational to suppose that judges in the inferior criminal courts all over the country possess the background or knowledge sufficient for an informed judgment on the subject.

The power of "judicial notice" is, as to matters involving First Amendment protections, one to be used with great caution, and if there is the slighest doubt as to the facts or common knowledge of the facts, evidence should be required. "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner* v. *Louisiana*, 368 U.S. 157, 173. The basis for appellate review and constitutional judgment is undermined "where the evidence is unknown". *Id.*, at 173.

There is no undue hardship placed upon the prosecution in requiring the State to prove the limits of candor and the extent to which the writing in question exceeds such limits. Prosecutors have successfully assumed the burden at the trial level in a number of obscenity prosecutions. *State* v. *Jacobellis*, 115 Ohio App. 226, 175 N.E. 2d 123 (1961), aff'd 173 Ohio St. 22, 179 N.E. 2d 777, rev'd 378 U.S. 184; *People* v. *Smith* (*Smith* v. *California*), App. Dept. Calif. Superior Court, No. CR A-5113, affirming judgment of conviction after jury trial and expert testimony offered on behalf of prosecution involving sale of *Tropic of Cancer*, cert. granted 373 U.S. 901, judgment vacated and case remanded to state court, 375 U.S. 259.

The judgment of conviction as obtained here constitutes a broad departure from any specific constitutional guarantees, including the due process guarantees "representing fundamental ideas of fair play and justice in civilized

society". *In re Oliver*, 333 U.S. 257, 282. The question involved is of substantial importance to the community in general, and it is bound to arise in every obscenity prosecution. It should, it is submitted, be determined by this Court.

2. It is also submitted that the standard of proof required under the Constitution in obscenity prosecutions has not been satisfied in this case with respect to the issue of *scienter*. This Court held in *Smith* v. *California*, 361 U.S. 147, that the strict liability feature of the California ordinance there involved would seriously restrict the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any scienter on his part regarding the book's obscenity". 361 U.S. at 160.

In view of the ruling in *Smith* v. *California*, and constitutional principles implicated therein, courts have required the prosecution to plead and prove that the accused knew that the material was obscene. In *State* v. *Locks*, 397 P. 2d 949, the Arizona Supreme Court invalidated the state's obscenity law as unconstitutionally vague, and held that an accused "cannot be found guilty unless he had knowledge of the obscene or indecent nature of the material which it is contended he was keeping for sale and exhibiting". 397 P. 2d at 951. Noting that the words "obscene or indecent", without statutory definition, are words of "varied meaning, varying in definition from case to case" (397 P. 2d at 951), the Arizona Supreme Court stated "it is obvious that a layman would have nothing but difficulty and confusion in his mind were he to attempt to work out his own definition of the words 'obscene or indecent' as used in A.R.S. 13-532" (397 P. 2d at 952).

If the constitutional standard relative to *scienter* is to be maintained, plainly the proof in the record must be of "convincing clarity" to satisfy the demands of such standard. *New York Times Co., et al.* v. *Sullivan*, 376 U.S. 254, 284-286. See also, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 491-495. For in the free speech and free press areas, it is essential that those alleged to be engaged in "criminal speech" shall not be condemned without "clear, convincing and unequivocal" proof of specific unlawful knowledge and intent. Such proof must be "solid". There must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" as is implied in an attempt to make punishable a mental state in a context of constitutionally protected freedoms. *Baumgartner* v. *United States*, 322 U.S. 665, 670. See also, *Hartzel* v. *United States*, 322 U.S. 680, 686-687; *Gonzales* v. *Landon*, 350 U.S. 920. "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co., et al.* v. *Sullivan*, 376 U.S. 254, 285.

It is submitted that the proof adduced in the record herein was totally inadequate to satisfy the state's constitutional burden of proof on the issue of *scienter*.

There was no testimony in this case that anyone connected with petitioner had reason to believe that the material was obscene. The only witness produced by the State was the arresting officer who testified to a conversation with petitioner's president, Irving Herman, and advised him that he had a search warrant for certain books supposed to be pornographic. Herman looked at the books and answered that they were not pornographic (R. 12). That is the entire record on the subject.

This Court has been concerned with the question of scienter in a number of situations. Indeed, in *Redrup* v.

*New York,* 386 U.S. 767, and its companion *Austin* case, the Court originally granted certiorari only on the issue of scienter but finally decided the cases on the basis that the materials involved were not obscene.

The question is scienter is again involved in the case of *Rabeck* v. *New York* in which an appeal to this Court has been taken and the Jurisdictional Statement will shortly be filed. The question is bound to recur. It is important, therefore, that this Court clarify the law by indicating what kind of evidence would be sufficient to justify an inference of knowledge of the character of material involved.

In this connection we submit also that it is essential for the prosecution to show not only that the accused knew what kind of material was involved but also that he had reason to believe the material violated the law.

Particularly is this true in New York where the statute, New York Code of Criminal Procedure, § 22(a), provides for injunctive relief against the distribution of material deemed obscene. That was the procedure used in *Larkin* v. *G. I. Distributors,* 14 N.Y.2d 869. Obviously, if after a finding of obscenity any material involved in that proceeding were sold, there would be sufficient basis for finding that the seller had knowledge that the material violated the law. Otherwise, in this delicate field of First Amendment rights the fear of prosecution in connection with material that is in any way doubtful is bound to have a deterrent effect. The question is important and should, therefore, be reviewed by this Court.

3. We do not see how the finding of obscenity in the case at bar can stand in view of this Court's decisions in *Redrup, supra,* and the dozen or so cases decided on June 12, 1967. Moreover, the question of the extent to which material appealing to homosexuals is protected should be settled by this Court. (*Cf. One, Inc.* v. *Olesen,* 355 U.S. 361; *United States* v. *Klaw,* 350 F.2d 155.)

We believe, therefore, that there are important constitutional issues involved here which have not been, but should be, resolved by this Court.

Respectfully submitted,

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